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No. 08-710

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SUPREME COURT, U.S.

In The

Supreme Court of the United States

RICHARD AND SHARON THEUSCH,

Pro- Se Petitioners,

v.

TAD BERG, et al.,

Respondents,

On Petition For Writ Of Certiorari To The State Of Minnesota In The Court Of Appeals

PETITION FOR REHEARING

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STATEMENT
REASONS FOR GRANTNG REHEARING

I. QUESTIONS PRESENTED ARE OF EXCEPTIONAL IMPORTANCE AND REQUIRE THIS COURTS INTERVENTION

The questions presented are of national importance. The Appellant Decision discards valid state law and utilizes an invalid statute for the purposes of acquiring private land for public use. It deepens an entrenched conflict that states may utilize invalid statutes in the event of unlawfully recording town roads to obtain "private property for public use" thus denying citizens of their property, constitutional and civil rights without due process of law and splits State and Federal government.

Federal law provides: "All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to

inherit, purchase, lease, sell, hold, and convey real and personal property." (U.S. Code Title 42 Section 1982.")

A taking is reached when a government entity destroys the net income from prohibiting some of the rights to use of the property. Unlawfully recording a false instrument falsely claiming 66 foot roads against private legal land titles without proper statutory "notice" strips citizens of their rights to sell, hold and convey their property as guaranteed by U.S. Code 42 Section 1982 and splits the State and Federal Government on property rights issues and threatens to overturn the 5th and 14th Constitutional Amendments.

II. THE APPELLANT COURT DECISION IS WRONG ON THE MERITS

Utilization of MS 160.05 that dedicates a road by "maintenance," is by law, invalid; and is a violation of State law that requires town roads to be 66 feet (four rods) wide. (MS 160.04.) *Maintenance* is authorized only on lawfully "*recorded*" town roads. (Minn. Stat. 164.36.) The alleged road on

Petitioners' property is neither lawfully recorded (MS 164.07 Subd. 11), is not lawfully 66 feet wide (MS 160.04), and is not a "Town Road" as defined in statutes. (M.S. 160.02.) Although many roads may exist by the six-year statute (Minn. Stat. 160.05), and therefore have an easement for only that portion of the road, which is maintained; "this is a violation of Minn. Stat. 160.04 which requires roads to have 66 foot (four rod) right-of-ways." *(The Township Road Study by the Sixth Regional Development Commission 1984.)*

Petitioners hold title fee to the property covered by the alleged road and do not receive a tax credit for the road. The Township has no legal right of claim to Petitioners' property. "Trespass on the premises of another and without right, ..." is "Trespass." (Minn. Stat. 609.605 Subd. 1, D3.) Only Petitioners property was damaged. The row of trees, under power lines, across from Petitioners' property, were left standing.

Alluding to a road on a map or document is not a valid right of claim to private property.

When asked how a 50 foot road became a 66 foot road as it enters Petitioners' property the previous County Surveyor stated, "I don't know...ask the Township..." (See: Sworn trial deposition 8/4/06.)

Unlawfully recording and certifying a false claim affecting private property also slanders the Legal Abstract of Title. No individual in the United States can be expected to take action to protect his property rights and legal Abstract of Title unless he is given "notice" of the intended claim against it. Petitioners were not made aware of the unlawful claim against their property until August 2006. (App. 74.) The Township's recorded 66 foot claim is even wider than the 50 foot 2008 unjust Appellant ruling.

Federal law provides:

> "Whoever, being an officer or other person authorized by any law of the United States to record a conveyance of real property or any other instrument which by law may be recorded, knowingly certifies falsely that such *conveyance* or instrument has or has not been recorded, shall be fined under this title or imprisoned not more than five years, or both."

(U.S. Code Title 18 Section 1021 Title Records.)

Minnesota law provides: "Every conveyance of real estate shall be recorded in the office of the county recorded where such real estate is situated;..." (507.34)

"Booth's Town and City Manual notes that any road establishment, alteration or vacation order should be filed with the county auditor as well as the county recorder." (*Town Road Study Sixth Regional Development Commission 1984.)*

However, the township failed to do so in establishing Bambi Trial. *(Audit Report of Leslie Township by, State Auditor. 1973)*

The township again overstepped its authority in falsely recording a "66 foot" town road on Petitioners' property.

In a report to Minnesota Department of Transportation it states:

"A valid road order is defined as a road order which a court will recognize and honor as establishing a township road under the law. An invalid road order is one which the court will not

recognize and not honor as establishing under the law."

"If the road order has not been recorded with the County Recorder and the road has not been developed and maintained by the township, the township will not succeed in claiming that the township road described in the road order is a township road." *(Proposal for an Alternate Method to Record Township Roads – Final Report to Minnesota Department of Transportation 1986.)*

It was ruled that Petitioners' claims were "barred by Minn. Stat. 160.05." Town Roads are required to be lawfully recorded at "66 feet wide" and maintenance is authorized only on "*recorded*" roads. Therefore, the Appellant decision is wrong on the merits of this case. The Court of Appeals also ruled that "whether the township failed to satisfy the requirements of Section 164.35, Subd. 4, is irrelevant because Gateway Drive has been established as a public road by statutory dedication under section 160.05." Petitioners respectfully disagree. Minn. Stat. 160.05 is not a valid law and is not applicable in this case. Minn. Stat. 160.04, which requires

roads to be 66 feet wide, is valid. Minn. Stat. 164.35 was created by the legislature to provide a comprehensive procedure for recording existing town roads. A town following the statute basically passes a resolution indicating its intent to consider recording its roads, develops a map of its roads, determines if any right of way needs to be acquired in order to make the right of ways 66 feet wide, gives "notice", holds a hearing, follows the Minn. Stat. Sec. 164.07 procedure if addition right of way must be acquired, adopts by resolution and then records the map. (MS 164.35 Subd. 4.)

The constitutionality of this procedure was challenged. Because the court found the procedure could result in a town claiming private property it had not acquired as part of the road, (although it found to have properly followed procedures), the court held that the statute was unconstitutional. It said that, "even though notice is required, the statute does not contain a mechanism for compensating owners for any land." *(Alton v. Wabedo Tp.* 524 N.W.2d 278 (1994.) The Statute was amended to provide a procedure for acquiring and paying for any

land that is taken as part of the process. (MS 164.35 Subd. 4 (g.) Specifically, the statute directs the board to use the formal town road establishment and alteration procedure in Minn. Stat. Section 164.07 if land must be acquired. Minn. Stat. 164.35 is relevant. It provides "notice" (due process of law) as well as providing compensation for property taken for public use. Utilizing Minn. Stat. 160.05 to take private property for public use instead of utilizing valid law is contradictory and splits the State and Federal courts.

The Town Road Study requested by the Minnesota State Legislature was undertaken by the Minnesota Department of Transportation to determine the extent of maintained township road mileage throughout the State of Minnesota so that proper allocation of state dollars might be made to township government for road construction and maintenance. This study states:

> "It is important to note that the resolution will be reviewed by an attorney examining title to any property over which any township road described in the resolution passes...and

> equally important that the resolution contain the factual information upon which the township relies in asserting its claim to the various roads described therein."

"The purpose of the resolution is to inform the public of the township roads claimed by the township and the basis of each such claim."

"In the absence of a procedure such as this, the expenditure of township funds on township roads for which no documents are recorded in the office of the County Recorder may be questioned, i.e. the township is spending public funds upon a road which it does not own."

> "Finally, it is not known if the Uniform Real Property and Relocation Policies Act applies to townships. If it does, townships might be forced to monetarily compensate property owners when they try to expand their claim on a road beyond the maintained portion. The implications of such a requirement are disastrous." *(Township Road Study Final Report to Minnesota Department of Transportation 1984.)*

If citizens of townships are being denied their constitutional right to "just compensation for property taken for public use" because townships may have to compensate them for the "government takings" than this would be "disastrous" for many citizens in all Townships across the United States..

Failure to record conveyances accurately and properly results in unlawful use of property.

> "State Auditor. Whenever a public employee or public officer of a political subdivision or charter commission discovers evidence of...unlawful use of public funds or *property*...the employee or officer shall promptly report to law enforcement and shall promptly report in writing to the state auditor a detailed description of the alleged incident or incidents." (MS 609.456.)

Minn. Stat. 160.05 was amended in 1982. Instead of it providing dedication of town roads "to width of two rods on each side of the center line," it was amended to read dedication was to "width of actual use." Laws of Minn. Ch. 424 Sec. 40 Subd. 1 (1982.) Respondents recorded a "66 foot" town road

on Petitioners' property in 1991 without notice and without following proper procedures.

Townships have no inherent powers and instead only have those powers delegated by the legislature. Knowingly exercising a power the town does not have or knowingly exceeding a power it does have is unlawful. Only under the power of legislature do townships have the authority to maintain and establish roads. Respondents violated the color of law statute by unlawfully obtaining and unlawfully maintaining Petitioners' property. Lawfully recording the road was relevant and a critical part of preserving any claim of right to Petitioners' property by the Respondents. Townships who overstep their authority, without accountability threaten the rights of citizens in all townships.

"A public officer or employee who does any of the following, for which no other sentence is specifically provided by law, may be sentenced..."

"1) intentionally fails or refused to perform a known mandatory, nondiscretionary, ministerial duty of the office or employment within the time or in the manner required by law, or..."

"2) in the capacity of such officer or employee, does an act knowing it is in excess of lawful authority or knowing it is forbidden by law to be done in the capacity; or

"3) under pretense or color of official authority intentionally and unlawfully injures another in the other's person, property, or rights; or

"4) in the capacity of such officer or employee, makes a return, certificate, official report, or other like document having knowledge it is false in any material respect." (M.S. 609.43.)

"Definitions...1) "Public Officer"...f) any person exercising the functions of a public officer." (M.S. 609.415.)

Petitioners were also not given "notice" of the vacation of a portion of the original platted Bambi Trail along the section line which was "dedicated to the public forever." (App. 62.) A portion of this platted road was vacated without notice to the Petitioners. The wider road was recorded forking through Petitioners' property without lawful notice. Proper vacation procedures require "hearing" and "notice" to affected property owners. (M.S 164.07,

Subd. 2.) "When a plat has been approved it shall be certified by the town clerk or auditor as the case may be." (M.S. 505.03.) The 1960 Recorded Plat of Little Deer Beach, which includes Bambi Trail, lacks the signature of a township chairman or official. Thus, the township has no legal right of claim to the "50 foot" and "26 foot" platted portions of the platted trail, nor to the unlawfully recorded "66-foot" unplatted portions of the dead end trail.

III. THE APPELLANT COURT'S DECISION CONFLICTS WITH THIS COURTS PRECEDENTS

State courts are bound to give effect to federal law when it is applicable and to disregard state law when there is a conflict. The decision of the Appellant Court clearly establishes an inferior precedent for government acquiring private property and the invalid local law utilized in this case should be discarded. The substance of Minn. Stat. 160.05 runs contrary to the U.S. Constitution and Federal Law. "All laws which are repugnant to the

Constitution are null and void." *Marbury v. Madison,* 5 U.S. (2 Cranch) 137, 174, 176, (1803.)

There is a deep conflict between state and federal courts regarding the utilization of an abolished statute to take private property for public use in the event of an unlawfully recorded road. It is impossible for law, which violates the Constitution to be valid.

> "The general rule is that an unconstitutional statute, though having the form and the name of law, in reality is no law, but is wholly void, and ineffective for any purpose; since unconstitutionality dates from the time of its enactment, and not merely from the date of the decision so branding it. No one is bound to obey an unconstitutional law and no courts are bound to enforce it." *(16th American Jurisprudence 2d, Section 177 late 2nd Section 256.)*

Taking the property on a false instrument and than utilizing an invalid statue to empower the unlawful taking, contradicts Federal law which sets a high standard of "fair and equitable treatment"

when property is taken for public use. The Appellant decision is contrary to the provisions envisioned in Federal law and creates a split between State and Federal government. In acquiring property for public use Federal law provides:

"d)...Before the initiation of negotiations, the Agency shall establish an amount which it believes is just compensation for the real property."

"h)...The Agency shall not advance the time of condemnation or defer negotiation or condemnation..."

"l)...If the Agency intends to acquire an interest in real property exercise of power of eminent domain, it shall institute formal condemnation proceedings and [not intentionally make it necessary for the owner to institute legal proceedings to prove the fact of the taking of the real property]." (U.S. Code Title 42 Ch.61 Section 24.102.)

Utilizing a statute of local law, which, by law is invalid, to empower townships to take private property for public use is unconstitutional and wrong."

"An unconstitutional act is not law, it confers no right; it imposes no duties; affords no protection; it creates no office; it is in legal contemplation, as inoperative as though it had never been passed." *(Norton v. Shelby,* 118 U.S. 425 p. 442.)

"Experience should teach us to be most on our guard to protect liberty when the government's purposes are beneficent...the greatest dangers to liberty lurk in insidious encroachments by men of zeal, well meaning but without understanding." *(Olmstead v. United States,* 277 U.S. 438 (1928.)

> "The due process clause of the Fourteenth Amendment provides that "no state shall deprive any person of life, liberty, or property, without due process of law." (U.S. Const. Amend. XIV Section I.) A requirement of due process "is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of [State] action and afford them an opportunity to present their objections." *(Mullane v. Central Hanover Bank & Trust,* 339 U.S. 306, 314 (1950.)

"The due process clause requires the State take reasonable additional steps to provide notice." *Jones v. Flowers,* 547 U.S. 04-1477 (2006.)

"The taking must be for public use and compensation must be paid." *Kelo et al v. City of New London,* 457 U.S. (2005.)

Repeated failure to give proper statutory "notice" is a key element in the "unlawful" taking posed in the questions to this court and an important irregularity, which denied the rights of Petitioners. The unconstitutionality of utilizing the invalid local statue is clear. "No legislative act which is contrary to the constitutional can be valid. When government violates the Constitution, government then becomes an illegal entity and relinquishes its Constitutional authority. This places the burden of correction squarely on the people." *(Federalist Papers No. 78 Alexander Hamilton.)*

IV. STATE AND FEDERAL COURTS ARE SPLIT

Federal law provides:

"All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contract, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and *property." (*emphasis added) (U.S. Code, Title 42 Section, 1981.)

The decision of the Appellant court has the potential to strip citizens of their rights to be secure in their property and splits State and Federal courts.

"To give him liberty, but take away his property which is the fruit and badge of his liberty, is to still leave him a slave." *(George Sutherland, Associate Justice of the Supreme Court, 1921.)*

An invalid and inapplicable statute of local law, utilized to establish a townships' claim to private property for a *new* road or to widen old roads creates conflicts with constitutional and federal law and splits State and Federal courts. The invalid statute of local law should be discarded and Federal and Constitutional law should be applied. This unjust

decision sets a precedent for further deprivation, abuse and bias in the judicial system and calls for an Appellant discretionary review.

CONCLUSION

There is a deep and retractable conflict regarding the questions presented, therefore, the Petitioners' Request for Rehearing should be granted.

Respectfully submitted,

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No. 08-710

CERTIFICATE OF GOOD FAITH

March 20, 2009

Petitioners hereby certify that the following Petition for Rehearing was **Submitted in good faith,** and **not for the purpose of delay.**

/s/_____

RICHARD AND SHARON THEUSCH

Pro-Se Petitioners

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Subscribed and sworn to before me

On March 20, 2009

_____

Notary Public

Alexandria, Minnesota